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Paper 15

MORRIS E LEWIS
6104 JOYCE DRIVE
CAMP SPRINGS, MD 20748

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OFFICE OF PETITIONS

In re Application of
Morris Lewis
Application No. 09/339,059
Filed: June 23, 1999
Attorney Docket Number: LEWIS

DECISIONS ON PETITION

This is a decision on the petition under 37 CFR §1.181 filed January 21, 2003 and the petition to revive under 37 CFR §1.137(b), filed February 19, 2003 to revive the above-identified application.

The petition to withdraw the holding of abandonment is dismissed.
The petition to revive under 37 CFR 1.137(b) is granted.

This above-identified application became abandoned for failure to timely file a response to a non-final Office Action which was mailed on April 12, 2002. The non-final Office Action set a three (3) month shortened statutory period for reply. Petitioner submitted a one month extension of time request and fee in the amount of \$55.00 in July (July 8, 2002), August (August 6, 2002) and September (September 10, 2002). The request for extension of time in July was the only timely submission with the appropriate fee in the amount of \$55.00. As such the reply period was extended until August 12, 2002. An untimely response to the Office Action was received on October 15, 2002. Accordingly, this application became abandoned on August 13, 2002. A Notice of Abandonment was mailed on December 19, 2002.

Petition to Withdraw the Holding of Abandonment

Petitioner contends the abandonment of the above-identified application should be withdrawn because he is pro se and petitioner was not aware he was required to submit request for extension of time with appropriate fees pursuant to 37 CFR 1.17(a)(1)-(a)(3).¹ Petitioner further argues he was out of the country, thus he could not return

¹ 37 CFR §1.17

Patent application and reexamination processing fees.

(a) Extension fees pursuant to § 1.136(a):

(1) For reply within first month:

By a small entity (§ 1.27(a))..... \$55.00

By other than a small entity..... \$110.00

(2) For reply within second month:

Examiner Rosen's December 19, 2002 phone call. Petitioner argues the missed phone call should be treated as an Office Action that was never received. (Delgar v. Schulyer, 172 USPQ 513 (D.D.C. 1971). Lastly petitioner argues the abandonment should be withdrawn because petitioner corrected any deficiencies with the January 21, 2003 "Petition to Correct Extension For Response Payment" and the accompanying \$300.²

Petitioner's arguments have been considered but they are not persuasive. The fact that the petitioner is prosecuting the above-identified application without benefit of legal representation does not absolve applicant from adhering to the rules governing request for extension of time. Petitioner's lack of knowledge or improper application of the patent statute, rules of practice or the Manual of Patent Examining Procedure (MPEP) does not warrant the withdrawal of the holding of abandonment.³

Petitioner's argument that the missed phone call should be treated as an Office Action never received fails because the application was abandoned as a matter of law on August 13, 2002.⁴ Petitioner submitted a second payment of \$55.00 when the required fee for a two month extension of time was \$205.00. Hence, petitioner's request for extension of time was rejected because insufficient funds were submitted to obtain the extension of time. Furthermore, petitioner's reliance on Delgar to equate a missed phone call because one is out of the country to the non-receipt of an Office Action (this includes a Notice of Allowance) is misplaced. Examiner Rosen's phone call was a courtesy.

The "Petition To Correct Extension For Response" and the accompanying \$300.00 submitted on January 21, 2003 were untimely. As such petitioner is entitled to a refund of all of the money submitted to obtain extensions of time with the exception of the initial \$55.00. Pursuant to 37 CFR §1.136, an extension of time must be filed prior to the expiration of the maximum extendable period for reply. See In re Application of S., 8

By a small entity (§ 1.27(a))..... \$205.00
By other than a small entity..... \$410.00
(3) For reply within third month:
By a small entity (§ 1.27(a))..... \$465.00
By other than a small entity..... \$930.00
(4) For reply within fourth month:
By a small entity (§ 1.27(a))..... \$725.00

²Petitioner submitted three payments of \$ 55.00 for a total of \$165.00 in attempts of obtaining a three month extension of time. Petitioner was required to submit a total of \$465.00 to make a timely submission within three months from the shortened statutory period.

³ Petitioner is encouraged to contact the Inventor Assistance Center (800)786-9199 and the Office of Independent Inventors (703) 306--5568 to seek clarification of issues during the prosecution of this application.

⁴"Abandonment takes place by operation of law for failure to reply to an Office action ..." MPEP 711.03(c).

USPQ2d 1630, 1631 (Comm'r Pats. 1988). Petitioner's maximum period for request of extension of time expired on October 12, 2002. Accordingly, a treasury check in the amount of \$410.00 will be forwarded to petitioner for the money submitted towards a three month extension of time.

Accordingly petitioner is not entitled to withdrawal of abandonment.

PETITION TO REVIVE UNDER 37 CFR 1.137 (b)

A grantable petition pursuant to 37 CFR 1.137(b) must be accompanied by:

- (1) the required reply, unless previously filed;
- (2) the petition fee as set forth in 37 CFR 1.17(m);
- (3) a statement that "the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(b) was unintentional"; and
- (4) any terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)) required by 37 CFR 1.137(c).

The instant petition has been reviewed and found in compliance with the requirements of 37 CFR 1.137(b) is **GRANTED**.

This application is being forwarded to Technology Center 2100 for further processing of the Amendment submitted on October 15, 2002.

Telephone inquiries concerning this matter should be directed to the undersigned at (703) 306-0251.



Charlema R. Grant
Petitions Attorney
Office of Petitions